MALAYSIAN REPORTS

MULTAR v. LIM KIM CHET & ANOR.

[F.C. (Wan Suleiman Ag. C.J. (Malaya), Syed Othman & Abdul Hamid F.JJ.) September 9 & October 3, 1981]

[Johore Bahru — Federal Court Civil Appeal No. 251 of 1980]

Practice and Procedure — Appeal — When appeal court can disturb finding of facts — Crucial evidence misconstrued — Action for damages for personal injuries — No provisional assessment of damages by trial court — Whether appeal court can itself assess damages — Damages for loss of future earnings — Fracture of foot.

Tort — Negligence — Damages for personal injuries — Assessment of damages — Fracture of foot — Damages for loss of future earnings.

Damages — Foot — Multiple fracture — 1" shortening of foot.

In this case the appellant claimed damages for personal injuries sustained in a road accident which occurred between a timber lorry driven by the first respondent and a motorcycle ridden by the appellant. The learned trial judge dismissed the claim of the appellant and did not make a provisional assessment of damages. The appellant appealed.

Held: (1) although the appeal court were loath to disturb the finding of facts by the trial court, they have to interfere in the circumstances of this case, as crucial evidence had been misconstrued resulting in the uncertainty of the first respondent's evidence as to how he came in contact with the motorcycle being put in a favourable light and the consistency of the appellant's evidence being disregarded. On the evidence, the first respondent was wholly to blame for the accident;

(2) the trial court should have assessed the damages provisionally but as it failed to do so the appeal court has power itself to assess the damages in order to save costs. Both sides were asked to submit written submissions;

(3) in assessing damages the court will only consider the medical reports which were before the trial court and formed part of the agreed bundle of documents;

(4) there was no satisfactory evidence of loss of future earnings, but as the court was satisfied that the appellant had suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for loss of future earnings;

(5) considering all the circumstances the sum of $22,000 is the appropriate amount for pain and suffering, loss of amenities and earning capacity in the present case.

Cases referred to:-

(1) *Harrison* v. *National Coal Board* [1950] 1 K.B. 466, 477.

(2) *Reaney* v. *Co-operative Wholesale Society Ltd.* [1932] W.N. 78.

(3) *Ashcroft* v. *Curtin* [1971] 1 W.L.R. 1731.

(4) *Paramasivam & Anor.* v. *Abdul Aziz* [1976] 2 M.L.J. 91.

FEDERAL COURT.

Tan Hock Kim for the appellant.

N.T. Vello and *M. Varughese* for the respondents.

Syed Othman F.J. (delivering the judgment of the Court): We allowed this appeal which is against the decision of the High Court at Johor Bahru dismissing the appellant's claim for damages for personal injuries sustained in a road accident which occurred on January 8, 1976 at about 7.30 p.m. between a timber lorry driven by the first respondent and a motorcyclist, the appellant, along Jalan Ah Fook, Johor Bahru.

After hearing the arguments, we found the first respondent wholly liable for the accident. We now give our reasons.

Both vehicles were travelling in the same direction, the road being one-way, towards the roundabout (as it was then) which branched out to roads to the north, the east and back to town.

The appellant's case was that there was a traffic-jam on the road. He was travelling about 2 ft. from the edge of the road on the right side. In overtaking his motorcycle the rear off tyre of the lorry grazed the motorcycle. He fell, and could not get up. He was admitted to the General Hospital, Johor Bahru and discharged on March 16, 1976. He suffered severe injuries mainly on his left foot.

The first respondent's version was that at the time a bus stopped on the left side of the road. Seeing no vehicle from behind him he swerved to the right to overtake the bus. He gave his signal. After overtaking the bus a motorcycle came from behind and collided with the right side of the lorry. Later, he said that when overtaking the bus there was no motorcycle in front or on the right edge of the road, but he saw the motorcycle behind in the rear view mirror.

The initial finding of the learned trial judge can be put thus: The lorry had overtaken the bus and was reverting to its side of the road when the motorcycle coming from behind knocked into the right side of the lorry; this was confirmed by the appellant who said that the lorry overtook him on his left while he was travelling about 2 ft. from the right edge of the road.

From the record we cannot find any evidence to show that the first respondent, after overtaking the bus, was reverting the lorry to his side (left) of the road. If, indeed, the lorry had been reverting to the left side of the road after overtaking the bus, the lorry would have been moving to the left side of the road. The sketch plan shows that the lorry was on the extreme right lane. What the lorry driver said was that when the bus stopped on the left side of the road and seeing no vehicle behind him he swerved his lorry to the right to overtake the bus. He gave no indication when giving this piece of evidence whether or not the right side was clear at the time. It was only later that he said there was no motorcycle in front or on the right hand side of the road. Apparently this was an afterthought, most probably as a result of a prodding question by counsel.

In examination-in-chief at first he said he saw no vehicle from behind, but at the close of the examination he said he saw the motorcycle in the rear view mirror, and then in cross-examination he said he did not see the motorcycle in the rear view mirror. The appellant cannot be said to be confirming the first respondent's evidence in that he knocked into the right side of the lorry when he said that the lorry was overtaking the motorcycle on his left while he was about 2 ft. from the right edge of the road. The clear indication is that it was the lorry which came to the motorcycle's lane. Further, there was a clear subsequent finding that the motorcycle was already on the road when the lorry was overtaking the bus, and it is said that the evidence of the first respondent on this point coincided with the appellant's evidence that at the time he first realised the lorry was over-

taking him, half of its body had already passed him. However, the learned trial judge then made the following assessment:

"My assessment of this evidence is that, the lorry had already overtaken the stationary bus when plaintiff came to the road. He said that there was a taxi station on his right side of the road and therefore this was likely.

The agreed sketch plan and key at Ex. AB1 and 2 show that the motor lorry stopped 4 feet from the right edge of the road after the accident and the plaintiff's motor cycle was 1 foot 1 inch. This was a narrow space for the plaintiff to manoeuvre his motor cycle. In my view, the plaintiff had taken unnecessary risk unto himself when he came to the road knowing that there was not sufficient room for his motorcycle."

From this, it seems to us that the assessment had the effect of finding that the appellant was coming onto the road from the taxi station when the accident occurred. But we cannot find any evidence suggesting that this was so, either from the appellant's side or the respondents. In cross-examination, the appellant merely said that there was a taxi station before the market. His evidence in examination-in-chief that the accident happened near the market in front of Lido theatre, which, as we know, is after the market but on the left side of the road across Sungei Seget, was not challenged. Further, as indicated above, the trial court has clearly made the finding that the motorcycle was already on the road when the lorry was overtaking the bus. But the finding was put in the form that this evidence coincided with the appellant's evidence that at the time he first realised the lorry was overtaking him half of its body had already passed him. And, it was already agreed between the parties that both vehicles were travelling in the same direction when the accident occurred. The question of the appellant coming onto the road either from the taxi station or elsewhere should not, therefore, have arisen.

As far as we can see, the appellant's evidence is consistent with his report and the sketch plan. His evidence as to how the accident occurred was not challenged. The first respondent's report, on the other hand, is at variance with his evidence in court and the sketch plan. In the report he said he stopped the lorry when he heard someone knocking into the rear of the lorry. In court he said the motorcycle collided with the right side of the lorry. The sketch plan clearly shows that the motorcycle was at the right side of the lorry close to the right edge of the road with the front wheel almost near the driver's cabin of the lorry. From this we can only assume that the motorcycle must have moved forward slightly after being hit by the lorry.

The sketch plan should have been given further consideration. It shows that the road had 3 lanes, A-B 10′, B-C 12′ and C-D 12′. On the evidence before the court, the appellant must have been close to D, the right edge of the road. Now the first respondent's evidence in court had two versions. In examination-in-chief he said the bus stopped on the left side of the road which would mean lane A-B; so when he moved to the right he should only have been on lane B-C and not on lane C-D where the motorcycle was. But in cross-examination he said that when the bus stopped, it occupied part of the middle lane B-C, about 2 feet. By this, we understand that the bus must have encroached about 2 ft. onto the middle lane. On this evidence, there should have been a space of 10 ft. on lane B-C and 12 ft. of lane C-D which adds up to 22 ft. The lorry was 7 ft. wide. The space was more than ample to allow the lorry through without moving to the extreme right. Considering this we find the first respondent's explanation more unsatisfactory in that when overtaking the bus he had to move the lorry to the extreme right of lane and getting in the path of the motorcycle. In any event, since there was evidence of a traffic-jam, we can only assume that the bus must have stopped because of the traffic-jam. There was no evidence that the bus stopped to pick up passengers. It was clearly the duty of the first respondent to have waited behind the bus until the traffic moved again and not to move from lane to lane, unless the other lane was absolutely clear. In this case, however, on the respondent's own evidence he was driving the lorry through in a road-jam crossing from left side of the road to the right without regard to traffic coming up or in the other lanes, particularly the motorcycle.

We are loath to disturb the findings of facts by the trial court. But in the circumstances of this case, we find that we have to interfere as we are satisfied that crucial evidence has been misconstrued resulting in the uncertainty of the first respondent's evidence as to how he came in contact with the motorcycle being put in a favourable light and the consistency of the appellant's evidence being disregarded. On the evidence before the court, we are satisfied that the first respondent was wholly to blame for the accident.

In this case the trial court did not assess damages provisionally. Practice requires that assessment should be made even if the decision was against the plaintiff claimant. We need only draw attention to what Tucker L.J. said in *Harrison* v. *National Coal Board*:[1]

"I desire to add that in cases such as this, which involve difficult questions of law and are likely to be taken to appeal, it is always desirable that the trial judge, whether or not he is specifically requested by counsel so to do, should assess the damages provisionally if his decision is adverse to the plaintiff. Failure to do so frequently results in unnecessary further expenses to the parties."

In *Reaney* v. *Co-operative Wholesale Society Ltd.*[2] it was held that where in an action tried without a jury judgment has been given for the defendant, and on appeal the Court of Appeal holds that the plaintiff is entitled to recover damages, the Court of Appeal has power itself to assess the damages in order to save costs. (See *Halsbury's* Laws of England, 3rd ed., Vol. 11, para. 496, p. 306). Section 69(1) of the Courts of Judicature Act gives us all the powers and duties of the High Court in relation to appeals.

To enable us to assess the damages in this case, we asked both sides to submit written submissions.

From the written submissions and agreed documents, as at January 15, 1977 the appellant's condition as appearing in a medical report by Datuk Dr. Yeoh Bok Choon in the agreed bundle of documents reads (taking out the relevant parts) as follows:

"2. He walked with a limp on the left and was not able to wear shoes or slippers on the left foot.

3. There was a scar five and half inches long on the top of the left foot associated with a hard and large bony lump.
4. The left foot (toe to heel) was one inch shorter than the right but there was no shortening of the left leg.
5. Movements of the left ankle were restricted, especially the downward bending of the foot (plantar flexion left ankle) which was only half that of the right.
6. The left calf was two inches thinner than the right.
7. Movements of the left knee were within normal limits.
8. X-Rays of the left foot showed multiple fractures of all the five foot bones. The 3rd foot bone was missing and the remainder were grossly displaced and the ends on the ankle side were raised and gathered in a large bone lump described in (3) above. Any union of the foot bones present was mal-union, and most of the foot bones had a rarefied (thinned) appearance."

The doctor was of the opinion that the fractures of the foot bones have resulted in gross mal-union causing the scarring, the hard bony lump, the shortening of the foot and the restriction of movement at the ankle. These deformities will be permanent, and the resulting disabilities are liable to increase with time due to the onset of osteoarthritis in coming years.

Mr. Varughese, for the respondents, in his submission has referred to the medical report of Orthopaedic Surgeon dated October 17, 1980. Before hearing this appeal, Mr. Tan Hock Kim, for the appellant, applied to the court to introduce this report and other evidence as to future loss. This court rejected the application as we see no reason why this evidence could not have been made available at the trial after a lapse of so many years from the date of the accident. The respondents were awarded costs. Since this court has rejected the appellant's application, it does not mean that the respondents are entitled to use the report. In assessing damages this court will only consider the earlier medical reports which were before the trial court and which form part of the agreed bundle of documents.

Mr. Tan, for the appellant, has suggested that there should be a special amount for loss of earning capacity in the amount of $10,000. As no interest is to be given to this sum we are satisfied that he is claiming loss of future earnings. But no evidence was adduced to show the extent of this loss. At the time of the accident the appellant was with the Royal Malaysian Navy at K.D. Malaya, Woodlands. It was not shown in what capacity. After discharge from hospital it was shown that he worked in the sick bay of the Army. At the time of the trial he was employed as Army Bus conductor. Nonetheless, we are satisfied that with the severe injuries on the left foot, there would be loss of earning capacity. We need only refer to *Ashcroft* v. *Curtin*[3] where it was held to the effect that if there is no satisfactory evidence of loss of future earnings, but the court is satisfied that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for loss of future earnings.

In arguing on quantum both sides have referred to *Paramasivam & Anor.* v. *Abdul Aziz & Ors.*[4] The relevant headnote reads:

"... The first plaintiff endured much pain and suffering. He had to undergo skin-grafting and the donor areas left permanent ugly scars to the left leg and both thighs. His right leg and right foot suffered shortening and there were injuries to the toes including the loss of one toe. There was a likelihood that he might develop arthritis in his ankle joint and his right big toe and possibly pain in his right foot as a result of his deformities and injuries in the future."

The court awarded him the sum of $19,000.

The respondents' side argues that considering the injuries in that case, which were more extensive than those in the present case, the appellant should only be awarded $13,000. The appellant's side submits that the injuries are about the same. We find that although the injuries in the present case are on the foot, they are more massive. What the appellant has is not much of a foot but a mass of bones and flesh; the left foot has become shorter than the right foot by 1 inch, though there is no shortening of the left leg. We also have regard to the fact that this case was decided in 1976. With inflation, it should be accepted that money nowadays cannot be regarded as having the same value as in 1976. Considering all the circumstances we consider that $22,000 is the appropriate amount for pain and suffering, loss of amenities and earning capacity in the present case. Interest at 6% from service of writ. Special damage agreed at $400, 3% interest from date of accident.

Costs to the appellant here and in the court below. We have already ordered deposit to be refunded to the appellant.

Order accordingly.

Solicitors: *Tan & Tan; Varughese & Co.*

PALANIAPPA CHETTIAR v. SITHAMBARAM CHETTIAR & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 8, 9 & November 14, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 32 of 1980]

Practice and Procedure — Probate action — Application to have preliminary issue tried — Whether plaintiff estopped from contending that alleged will is valid.

In this case one Murugappa Chettiar died in 1969 leaving a will which purported to bequeath ½ share each to the appellant and the second respondent and certain properties to other legatees. The first respondent who was a son of the deceased was not given any share in the will and he contested the validity of the will. The appellant applied for probate of the will, while the respondent applied for letters of administration. As caveats were lodged by both parties the hearings of the applications were adjourned. The first respondent also brought proceedings in India. A compromise decree was made in India on June 29, 1972 whereby the three sons of the deceased including the appellant, the first respondent and the second respondent, agreed to share the joint family properties and all properties under the will equally. In the meantime the first respondent obtained an order for the Official Administrator to be appointed receiver and manager of the deceased's estate and subsequently an order was made that the appellant file a statement of accounts. An application was made by the appellant for the proceedings to be stayed pending the outcome of the litigation in India, but this was refused. An order was made that a probate action be instituted to propound the last will alleged to have been executed by the deceased with the appellant as plaintiff and the other parties as respondents. The 1st, 3rd and 4th defendants thereupon applied for a preliminary issued to be tried, that is whether the appellant is estopped from contending that the alleged will is valid. Wan Hamzah J. made an order accordingly and the appellant appealed.

Held: the learned judge was correct in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents is upheld, this could conclude